

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)

Amendment of Section 73.202(b))

Table of Allotments,)

FM Broadcast Stations)

(Alva, Mooreland, Tishomingo, Tuttle, and)

Woodward, Oklahoma))

MM Docket No. 98-155)

RM-9082

RM-9133

To: The Commission

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**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

APPLICATION FOR REVIEW

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APPLICATION FOR REVIEW

Ralph Tyler ("Tyler"), by his attorneys, and pursuant to Section 1.115 of the Commission's Rules, respectfully requests the Commission review the action of the Chief, Allocations Branch, made under delegated authority in the Report and Order, *Alva, Mooreland, Tishomingo, Tuttle and Woodward, Oklahoma*, DA 00-2885, released December 22, 2000, 65 Fed. Reg. 82296, published December 28, 2000 (herein "*R&O*"), *recon. denied* Memorandum Opinion and Order, released April 13, 2001, 66 Fed. Reg. 21681, published May 1, 2001 (herein *MO&O*).¹ The *R&O* denied Tyler's petition for rule making that sought to reallocate FM Channel 259C3 from Tishomingo to Tuttle, Oklahoma. The *MO&O*, upholding the reasoning set forth in the *R&O*, denied Tyler's Petition for Reconsideration. The sole basis for the denial was the Branch's view that the remaining local service in Tishomingo, noncommercial Station KAZC, is not an adequate substitute for the removal of KTSH from Tishomingo. Tyler shows herein that the Allocations Branch erred in its *MO&O* and that the Commission should reverse the Branch's action and allocate Channel 259C3 to Tuttle as originally proposed. In support thereof, Tyler shows the following:

Background and Summary of Argument

In response to a request by Tyler, the Commission issued a *Notice of Proposed Rule Making and Orders to Show Cause*, 13 FCC Rcd 25352 (1998), proposing *inter alia* to reallocate Channel 259C3 from Tishomingo to Tuttle, Oklahoma, and to modify KTSH's license accordingly. In both the *R&O* and the *MO&O* the Allocations Branch denied Tyler's proposal because it erroneously concluded that the proposed reallocation of Channel 259C3 from Tishomingo to Tuttle would not result in a preferential arrangement of allocations. The Allocations Branch's reasoning was based on the view that the remaining local service in

¹ As notice was published in the Federal Register on May 1, 2001, pursuant to Section 1.4 of the Rules, this petition is timely filed by May 31, 2001.

Tishomingo, noncommercial Station KAZC, is not an adequate substitute for KTSH. The Allocations Branch reached this conclusion even though it found that “Station KAZC complies with all technical requirements with respect to the noncommercial educational service and has an obligation to serve Tishomingo.”² But for the Allocations Branch’s erroneous finding that KAZC does not provide a local aural service to Tishomingo, Tyler’s proposal would have been granted. As shown below, this finding is not only unprecedented but also inconsistent with prior Allocations Branch and full Commission decisions. Furthermore, the Allocations Branch in making its decision should have considered KAZC’s subsequently filed modification application for facilities that will provide a 70 dBu signal to 100% of Tishomingo and replicate the present 60 dBu signal of KTSH.

The Commission should reverse the action taken by the Allocations Branch and allot Channel 259C3 to Tuttle as its first local service. The Allocations Branch left no question unresolved as to whether Tuttle is a community for allotment purposes or whether the allotment of Channel 259C3 to Tuttle would constitute a first local service to Tuttle.³ The decision turns on the question of whether the operation of KAZC at Tishomingo satisfies the concerns that Tishomingo not be left without a local aural service. Tyler shows herein that under all controlling precedent, KAZC meets the Commission’s requirements of providing a local transmission service to Tishomingo, and that, in any event, KAZC’s modification application for facilities that will exactly replicate those of KTSH counters the reasons stated in the *MO&O* for denying Tyler’s proposal.

² *MO&O* at para. 4.

³ The Allocations Branch accepted Tyler’s showings as to the qualifications of Tuttle as a community for allotment purposes.

Questions Presented For Review

1. Whether the Allocations Branch erred when it concluded that Station KAZC, the sole remaining local service in Tishomingo, was not an adequate substitute for KTSH?
2. Whether the Allocations Branch erred when it did not credit KAZC's pending application that proposes to provide a principal city signal to all of Tishomingo and replicate the existing service area of KTSH?

The Allocations Branch Erred in Failing to Find that KAZC Is a Replacement for the Removal of KTSH

In Modification of FM and TV Authorizations to Specify a New Community of License ("Change of Community R&O"), 4 FCC Rcd 4870 (1989), *recon. granted in part* ("*Change of Community MO&O*"), 5 FCC Rcd 7094 (1990), the Commission set forth criteria governing the modification of a station's authorization to specify a new community of license. The Commission found that video and audio broadcast services are two distinct services. Thus in a proceeding to change the community of license of a radio station the Commission stated that it would not consider the availability of video services. As for considering various audio services the Commission, in pertinent part stated:

Because AM and FM stations are considered to be joint components of a single aural medium, however, in a proceeding to change the community of license of an FM station, we will examine the availability of FM and AM services. Consistent with Commission precedent, we will consider both daytime and full-time AM stations as local aural transmissions services. Finally, both commercial and non-commercial stations are relevant to our analysis.⁴

In applying this standard in the instant case, the Allocations Branch concluded that:

⁴ *Change of Community MO&O*, at p. 7097 [footnotes omitted].

Even though station KAZC complies with all technical requirements with respect to the noncommercial educational service and has an obligation to serve Tishomingo, the fact remains that the residents of Tishomingo would not have the commensurate level of technical service currently being provided by KTSH. In fact, Station KAZC does not provide a 70 dBu signal to any portion of Tishomingo. . . . It is for this reason that the current Station KAZC service is not an adequate substitute and that the removal of Station KTSH would be analogous to the removal of a sole local service.⁵

Because the determination of the Allocations Branch is inconsistent with its own past precedent and those of the full Commission, it constitutes new policy. The Branch, however, failed to give adequate notice of that policy.⁶

The Allocations Branch appears to have concluded that for purpose of a 307 (b)⁷ comparison, KAZC constitutes an existing local transmission service, i.e. it is licensed to Tishomingo, complies with all technical requirements and has an obligation to serve Tishomingo.⁸ However, the Allocations Branch veers off course when it concludes that KAZC's service is not comparable to the service currently provided by KTSH. Because KAZC does not provide a "commensurate level of technical service", the Allocations Branch concludes, "the removal of Station KTSH would be analogous to the removal of a sole local service."⁹ From

⁵ *MO&O* at para. 4.

⁶ It is hornbook law that the FCC must give adequate notice before establishing a new precedent. See *Trinity Broadcasting of Florida v. FCC*, 211 F.3d 618 (D.C. Cir. 2000); *Orion Communications, Ltd. v. FCC*, 131 F.3d 176 (D.C. Cir. 1997); *Satellite Broadcasting Co., Inc. v. FCC*, 824 F.2d 1 (D.C. Cir. 1987).

⁷ 47 U.S.C. §307(b).

⁸ Section 307(b) restricts the Commission's licensing power to States and "communities." Accordingly, since its creation, the Commission has obliged broadcasters to (1) designate a principal community to be served and (2) serve that community. In the case of KAZC, the construction permit states on its face that KAZC's "Station Location" is "OK – Tishomingo," which was the "Principal Community" specified in response to Question 2 on page 1 of KAZC's underlying FCC Form 340, Application for Non-Commercial Educational Construction Permit filed January 27, 1997.

⁹ *MO&O* at para. 4.

there the Allocations Branch's analysis continues as if the reallocation of KTSH would leave no remaining local service in Tishomingo. It appears that the Allocations Branch established a new policy in conflict with the Commission's established policy as set forth in *Change of Community R&O* and *Change of Community MO&O*. More troubling is the Allocations Branch's failure to explain what it means by the phrase "commensurate level of technical service." How much coverage would a station have to provide before it could be considered to provide a "commensurate level of technical service?" Must the station left behind fully replicate the service being removed? If not, what percentage must be replicated?

There are many cases where the FCC has removed an FM channel from a community and left behind a service which did not fully replicate the service that was removed. For example, in *Pauls Valley and Heldton, OK*, 14 FCC Rcd 3932 (Al. Br. 1999), the Allocations Branch removed a Class C3 FM station and left behind an AM daytime station as the sole local aural service.¹⁰ Although Tyler cited *Pauls Valley* in his Petition for Reconsideration, the *MO&O* fails to explain why, in this case, the Allocations Branch departed from the policy enunciated in *Pauls Valley* - a policy which does not require that a departing allotment be fully replicated.

In *Scotland Neck and Pinetops, NC*, 7 FCC Rcd 5113 (Al. Br. 1992) a Class C3 FM station was reallocated from Scotland Neck to Pinetops leaving behind a daytime station as the community's sole aural facility. In that case the Allocations Branch concluded that while Scotland Neck will lose its only local nighttime transmission service, it will continue to receive reception service from one AM and seven FM stations. Likewise in *Ravenswood and Elizabeth, WV*, 10 FCC Rcd 3181 (Al. Br. 1995), the Allocations Branch authorized the reallocation of an FM station leaving the community of Ravenswood with only a daytime AM facility. Therein, the Allocations Branch reasoned "our concern about removal of Ravenswood's only local night-

¹⁰ KVLH-AM licensed to Pauls Valley has an authorized daytime power of only 1 kw.

time transmission service is ameliorated by the fact that Ravenswood has at least five fulltime reception services." *Id.*

As recently as June 2000, the Allocations Branch authorized the reallocation of an FM channel from a community without a remaining commercial station but with a remaining noncommercial educational FM station. In that case, *Everglades City, LaBelle, Estero, and Key West, Florida*, 15 FCC Rcd 9427 (Al. Br. 2000) (herein, "*Estero*"), the Allocations Branch reallocated a Class C3 FM station from LaBelle to Estero, Florida.¹¹ The Allocations Branch made the reallocation even though there was a loss of service to 17,759 listeners at LaBelle because the people in the loss area receive at least five full-time aural services, and are therefore, considered well served. Additionally, in *Estero*, the FCC rejected an argument that service to LaBelle from a noncommercial educational FM station would be inferior to the existing service from the commercial station.

In *Estero*, the Allocations Branch did not raise objections that a noncommercial FM station must place a city-grade signal over the community of license in order to be considered a remaining service.¹² In his Petition for Reconsideration, Tyler submitted a Technical Statement, incorporated herein by reference, which shows that KAZC covers 100% of Tishomingo with a 60dBu signal. Additionally, the Technical Statement shows that the area of the KTSH 60 dBu

¹¹ The LaBelle commercial station was operating with temporary Class A facilities.

¹² There was no signal strength requirement for noncommercial FM stations until the Commission adopted new Section 73.515 (effective January 19, 2001). In amending the rule, the FCC specifically recognized that many NCE FM stations operate at lower power levels and may not be able to comply with the 70 dBu commercial FM station principal community coverage requirement. Of critical significance, the Commission stated that: "We believe this modification balances the Commission's mandate under Section 307(b) of the Act with the service, technical, and financial realities of operating NCE FM stations." *Second Report and Order, Streamlining of Radio Technical Rules in Parts 73 and 74*, MM Docket No. 98-93, FCC 00-368, at ¶42 (released November 1, 2000). The Commission has, therefore, specifically found that a NCE-FM station satisfies Section 307(b) by providing 60 dBu service to 50% of the area or population of its community.

contour not served by KAZC is well served by sixteen or more services during the day. At night, over 75% of the area receives five or more fulltime services. The remaining 25% of the area or 8,900 persons receive service from one fulltime FM station and one fulltime AM station.¹³ Finally, as noted below, the proposed modification of the KAZC authorization would provide a 70 dBu signal to all of Tishomingo, even though a signal strength of that magnitude is not required even by the new rules.

The Allocations Branch Erred When it Failed to Fully Consider KAZC's Pending Application for a Construction Permit to Replicate the Signal of KTSH

The Commission should reverse the Allocations Branch's finding in the *MO&O* that the proposed KAZC existing service is not an adequate substitute for the removal of Station KTSH from Tishomingo. In addition, the Allocations Branch also erred in failing to consider the pending KAZC application which, when granted, will fully replicate the service currently provided by KTSH in Tishomingo.

On January 26, 2001, KAZC filed an application for minor modification of its construction permit. Upon grant, KAZC will replicate 100% of the service provided by KTSH. A copy of the construction permit application was attached to the Petition for Reconsideration and incorporated herein by reference. After the construction permit is granted and construction completed, the 70 dBu contour of KAZC will encompass 100% of Tishomingo and all the people who receive service from KTSH within the KTSH 60 dBu contour will receive the same level of service from KAZC.

Although the Allocations Branch states in the *MO&O* that the proposed, but unbuilt, increase in power for KAZC is not an adequate substitute for the existing KTSH facilities, the

¹³ The Commission has permitted allotment changes that would reduce the number of nighttime services received in a portion of the loss area where the proposed reallocation would provide the new community's first local aural service. *Healdton, Oklahoma and Krum, Texas*, 14 FCC Rcd 3932 at paragraph 4 (Alloc. Br. 1999). In the instant case, as in the *Healdton* case, no part of the loss area would be a white or gray area at night.

Allocations Branch failed to explain why it did not give KAZC an opportunity to upgrade its facilities before ruling on KTSH's Petition for Reconsideration. KAZC cannot even begin to upgrade its facilities until after the FCC acts on its pending application. The Allocations Branch erred in not allowing KAZC a reasonable opportunity to upgrade its facilities.

Conclusion

In summary, the Allocations Branch denied Tyler's proposal based on the mistaken belief that KAZC, even though it complies with all technical requirements with respect to noncommercial educational service and has an obligation to serve Tishomingo, would not provide the "commensurate level of technical service" currently being provided by KTSH.¹⁴ The Allocations Branch failed to explain what it means by "commensurate level of technical service." The Allocations Branch has departed from well-established Commission policy, which is based on Section 307 (b) of the Communications Act; i.e., stations are allocated to communities. Even daytime only AM stations, for purposes of Section 307 (b) comparison under the FM allotment priorities, are considered adequate local transmission services.¹⁵ Presumably these daytime AM stations provide a "commensurate level of technical service." The Allocations Branch may not take the draconian step of denying Tuttle a first local aural service without legal support for its action. *Trinity Broadcasting of Florida v. FCC*, 211 F.3d 618 (D.C. Cir. 2000).

Further, Station KAZC has pending an application for minor change to increase power and antenna height such that KAZC would provide city grade coverage to 100% of Tishomingo and replicate 100% of the KTSH signal. Thus, the service provided to the residents of Tishomingo by KAZC would be identical to the service being removed from Tishomingo. In

¹⁴ *MO&O*, at para. 4.

¹⁵ Change of Community *MO&O*, at p. 7097; *Ravenswood and Elizabeth, WV*, 10 FCC Rcd 3181 (Al Br. 1995).

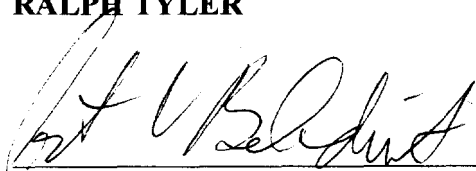
any event, the Allocations Branch should have given KAZC an opportunity to construct its facilities before action on Tyler's Petition for Reconsideration.

There being no public interest reason remaining to deny Tuttle its own radio station, Tyler respectfully urges the Commission to reverse the action of the Allocations Branch, and reallocate Channel 259C3 to Tuttle as that community's first aural service and modify the license of KTSH for operation at Tuttle. Tyler again reiterates his previous commitment to reimburse the licensee of KNID, Alva, Oklahoma, for its reasonable and prudent expenses incurred in changing channels from 259C1 to 260C1 at Alva. Tyler also restates that if the Commission should reallocate Channel 259C3 from Tishomingo to Tuttle, he will timely file an application for minor change construction permit for KTSH to operate on Channel 259C3 at Tuttle, and upon grant, he will construct the facilities at Tuttle.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Angela Y. Powell, a paralegal in the law offices of Smithwick & Belendiuk, P.C., certify that on this 31st day of May, 2001, copies of the foregoing Application for Review were mailed, postage prepaid, to the following:

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